

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM WEILAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

NO. CR-03-0070-EFS

NO. CV-07-0120-EFS

**ORDER DENYING PETITIONER'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE**

Before the Court, without oral argument, is *pro se* Petitioner William Weiland's Motion to Vacate, Set Aside, or Correct Sentence. (Ct. Rec. 100.) After reviewing the submitted material, the Court is fully informed and denies Petitioner's motion. The reasons for the Court's Order are set forth below.

I. Background

In February 2003, law enforcement officers lawfully searched Petitioner's property, seizing two rifles, ammunition, a small marijuana grow operation, and computer files containing child pornography. The Government charged Petitioner with felon in possession of a firearm and

1 ammunition, in violation of 18 U.S.C. § 922(g) (2001). The case went to
2 trial, and on November 14, 2003, and the jury found Petitioner guilty.

3 Because Petitioner's prior convictions included escape, first degree
4 theft, and four second degree burglary convictions, Petitioner was
5 considered a career criminal under 18 U.S.C. § 924(e). Accordingly, the
6 Court sentenced Petitioner to 188 months imprisonment, eight months over
7 the statutory minimum, and five years supervised release. The Ninth
8 Circuit affirmed Petitioner's conviction on August 24, 2005.

9 II. Discussion

10 1. Legal Standard - 28 U.S.C. § 2255

11 Under section 2255, a court must vacate and set aside a judgment and
12 discharge the prisoner, or resentence the prisoner, or grant a new trial,
13 or correct the sentence, if the court finds any one of the following: (1)
14 the judgment was rendered without jurisdiction; (2) the sentence imposed
15 was not authorized by law or otherwise open to collateral attack; or (3)
16 there has been such a denial or infringement of the constitutional rights
17 of the prisoner as to render the judgment vulnerable to collateral
18 attack. 28 U.S.C. § 2255.

19 A district court must grant a hearing to determine the validity of
20 a petition brought under section 2255 "unless the motions and the files
21 and records of the case conclusively show that the prisoner is entitled
22 to no relief." *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir.
23 1994) (quoting 28 U.S.C. § 2255). The court may deny a hearing if the
24 movant's allegations, viewed against the record, fail to state a claim
25 for relief or "are so palpably incredible or patently frivolous as to
26 warrant summary dismissal." *United States v. McMullen*, 98 F.3d 1155,
1159 (9th Cir. 1996) (internal quotations omitted). To earn the right

1 to a hearing, therefore, the movant must make specific factual
2 allegations which, if true, would entitle him to relief. *Id.* Mere
3 conclusory statements in a section 2255 motion are insufficient to
4 require a hearing. *United States v. Hearst*, 638 F.2d 1190, 1194 (9th
5 Cir. 1980). The choice of method for handling a section 2255 motion is
6 left to the discretion of the district court. *Shah v. United States*, 878
7 F.2d 1156, 1158 (9th Cir. 1989) (citations omitted).

8 **2. Restoration of Civil Rights By Oklahoma Law**

9 Petitioner asserts he was wrongly charged under 18 U.S.C. §
10 922(g)(1) because his civil rights to possess firearms were fully
11 restored by order of law after serving his sentence for four Oklahoma
12 felony burglary convictions. (Ct. Rec. 100-3 at 3.) The Government
13 answers that, under federal law, if Petitioner has not had his firearm
14 rights fully restored, then Petitioner is prohibited from possessing any
15 type of firearm. (Ct. Rec. 107 at 5.)

16 Section 922(g) states that it is "unlawful for any person . . . who
17 has been convicted in any court of, a crime punishable by imprisonment
18 for a term exceeding one year . . . to ship or transport in interstate
19 or foreign commerce, or possess in or affecting interstate commerce, any
20 firearm." 18 U.S.C. § 922(g). But "a person [who] has . . . had [their]
21 civil rights restored[] shall not be considered [] convict[ed] for the
22 purposes of this chapter . . . unless such . . . restoration of civil
23 rights expressly provides that the person may not ship, transport,
24 possess, or receive firearms." *Id.* § 921(a)(20).

25 To determine whether petitioner's civil rights are restored, this
26 Court should look to the whole of state law. See *United States v. Gomez*,
911 F.2d 219, 220 (9th Cir. 1990). Petitioner's four burglary

1 convictions occurred in Oklahoma, so Oklahoma law is appropriate.
2 Oklahoma law prohibits state or federal felons from possessing "any
3 pistol, imitation or homemade pistol, machine gun, sawed-off shotgun or
4 rifle, or any other dangerous or deadly firearm that could easily be
5 concealed on the person." OKLA. STAT. tit. 21 § 1283(A) (2007). "Rifle,"
6 as defined in this section, includes only rifles that have been shortened
7 to any length. OKLA. STAT. tit. 21 § 1283(G) (2007).

8 At issue here is whether § 921(a)(20)'s "unless clause" prevented
9 Petitioner from regaining his civil rights to possess a firearm. As the
10 Supreme Court indicated in *Caron v. United States*, "the unless clause is
11 activated if a restoration of civil rights 'expressly provides that the
12 person may not . . . possess . . . firearms.'" 524 U.S. 308, 314 (1998).
13 In *Caron*, the petitioner appealed a conviction under 18 U.S.C. §
14 921(g)(1) for four counts of possessing a firearm or ammunition after
15 having been convicted of a serious offense. *Id.* at 311. Petitioner
16 argued he could lawfully possess a rifle because Massachusetts state law
17 allowed felons to possess rifles or shotguns but not handguns. *Id.*
18 (citing MASS. GEN. LAWS. §§ 140:123, 140:129B, 140:129C (1996)). The
19 Supreme Court disagreed, finding such a reading would be "inconsistent
20 with any conceivable federal policy" and "impair the workings of the
21 federal statute." *Id.* at 315. The Supreme Court concluded the Federal
22 Government has an interest in a single, national, and broad protective
23 policy regarding possession of weapons and petitioner's reading of
24 section 921(a)(2) undermines this approach. *Id.* at 316.

25 Here, Petitioner's arguments are analogous to the petitioner in
26 *Caron*. He seeks to overturn his conviction because Oklahoma law does not
prohibit felons from possessing ordinary rifles. For the same reasons

1 the Supreme Court cited in *Caron*, Petitioner's arguments must fail
2 because allowing a felon to possess some firearms but not others creates
3 incongruities with congressional policy. 524 U.S. at 315.

4 In his reply, Petitioner argues *Caron* is inapplicable because the
5 Government cited the 2007 version of OKLA. STAT. tit. 21 § 1283(A), which
6 contains different language than its 1979 predecessor. In 1979, Section
7 1283 read as follows:

8 It shall be unlawful for any person having previously been
9 convicted of any felony in any court of a state or the
10 United States **to carry** on his person, or in any vehicle
11 which he is operating, or in which he is riding as a
12 passenger, any pistol, imitation or homemade pistol,
machine gun, sawed-off shotgun or rifle, or any other
dangerous or deadly firearm which could be as easily
concealed on the person, in personal effects or in an
automobile, as a sawed-off shotgun.

13 OKLA. STAT. tit. 21 § 1283(A) (1979) (emphasis added). Petitioner asserts
14 that the old statutory language "to carry" does not trigger the unless
15 clause because the old statutory language only prevented him from
16 carrying firearms, not possessing them. As Petitioner correctly states,
17 the rifles law enforcement officers seized were located in the laundry
18 room and an outbuilding, not on Petitioner's person. To be sure, section
19 1283's 1979 statutory language differs from section 1283's 2007 statutory
20 language. But the difference in statutory language is inconsequential
21 when considering the Supreme Court's purpose in *Caron*.

22 The Supreme Court in *Caron* was concerned with the incongruous
23 results when state laws permitted felons to possess certain firearms but
24 not others. 524 U.S. at 315. The 1979 version of Section 1283 is no
25 different than the 2007 version of Section 1283 or the Massachusetts law
26 in *Caron* - each statute in some form, whether it be carrying or

1 possessing, restricts a felon's ability to handle or hold certain
2 firearms but not others. The Supreme Court concluded such selectivity
3 contravenes the Federal Government's broad restrictions on possessing
4 weapons. *Id.* at 316. Based on *Caron's* analysis, Petitioner's civil
5 rights were not fully restored by order of Oklahoma law.

6 **3. Restoration of Civil Rights By Order of the Oklahoma Pardon and Parole**
7 **Board**

8 Petitioner also asserts that the Oklahoma State Board of Pardons and
9 Paroles provided him with a notice that his civil rights were restored.
10 (Ct. Rec. 100-3 at 3.) The Government responds that Oklahoma statutes,
11 not certificates or orders, restore prisoners' civil rights.
12 (Ct. Rec. 107 at 7.)

13 When a felon's civil rights are restored by a certificate or other
14 written document, any express reservations, such as prohibiting the felon
15 from possessing firearms, must be contained in the document itself.
16 *United States v. Gallaher*, 275 F.3d 784, 792 (9th Cir. 2001). But
17 Oklahoma is a state that automatically restores a prisoner's civil rights
18 upon sentence completion. *United States v. Sanders*, 18 F.3d 1488, 1490
19 (10th Cir. 1994).

20 Here, the record indicates that the Oklahoma State Board of Pardons
21 and Paroles sent one document to Petitioner - his Certification of
22 Parole. The Certificate of Parole acknowledges Petitioner's parole and
23 sets forth the rules and conditions of parole. Nowhere does the document
24 indicate Petitioner's civil rights were restored. Petitioner's arguments
25 must fail because he cannot cite to official documentation stating his
26 civil rights were restored.

4. Sixth Amendment Violation Due to Sentencing Enhancement

Petitioner argues that sentencing enhancements based upon prior convictions violate the Sixth Amendment's jury trial requirement. (Ct. Rec. 100-3 at 9.) The Government responds that enhancing a defendant's sentence on account of his prior convictions does not violate the Sixth Amendment. (Ct. Rec. 107 at 7.)

Here, Petitioner appealed this issue to the Ninth Circuit. In *United States v. Weiland*, the Ninth Circuit held that "a district court may enhance a sentence on the basis of prior convictions, even if the facts of those convictions was not found by a jury beyond a reasonable doubt." 420 F.3d 1062 (9th Cir. 2005) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). Because *Almendarez-Torres* remains good law, Petitioner's arguments are without merit.

5. Fifth and Sixth Amendment Violation Due to Sentencing Guidelines

Petitioner asserts that application of U.S. SENTENCING GUIDELINES MANUAL § 4B1.4 violated his Fifth and Sixth Amendment rights. (Ct. Rec. 100 at 2.) The Government responds that the Court properly used § 4B1.4 when it sentenced Petitioner. (Ct. Rec. 107 at 8.)

Although district courts are not required to sentence within an applicable Guideline range now that the Sentencing Guidelines are advisory, courts nevertheless "must consult [the] Guidelines and take them into account when sentencing." *United States v. Booker*, 543 U.S. 220, 264 (2005).

Here, the Court sentenced Petitioner to 188 months imprisonment pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e). This sentence was within the applicable Guideline range and only eight months over the statutory minimum. The Ninth Circuit has held that neither

1 *Blakely* nor *Booker* have any impact on the imposition of a mandatory
2 minimum sentence. *United States v. Decoud*, 456 F.3d 996, 1021 (9th Cir.
3 2006). As directed by *Booker*, the Court properly consulted the
4 Guidelines when it sentenced Petitioner. This consultation neither
5 offended nor implicated Petitioner's Fifth and Sixth Amendment rights.

6 **6. Ineffective Assistance of Counsel**

7 Petitioner asserts his counsel failed to fully explore and challenge
8 his Oklahoma convictions. Specifically, Petitioner claims that
9 investigation would have found that his civil rights were fully restored,
10 precluding him from prosecution due to Section 921(a)(20)'s provisions.
11 (Ct. Rec. 100-3 at 2.) The Government contends that Petitioner received
12 competent advise and vigorous representation throughout pre-trial, trial,
13 and post-trial phases. (Ct. Rec. 107 at 8.)

14 Claims of ineffective assistance of counsel are governed by
15 *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to
16 prove that counsel acted ineffectively, a petitioner must meet a
17 two-prong test. First, the petitioner must show that his counsel's
18 performance fell below an objective standard of reasonableness. *Id.* at
19 687. A court's review of counsel's performance should be "highly
20 deferential" because there is a "strong presumption" that counsel
21 rendered adequate assistance and exercised reasonable professional
22 judgment. *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th
23 Cir. 1986). Second, a petitioner must also show that his counsel's
24 deficient performance prejudiced his defense. *Strickland*, 466 U.S. at
25 687. "The [petitioner] must show that there is a reasonable probability
26 that, but for counsel's unprofessional errors, the result of the
proceeding would have been different. A reasonable probability is a

1 probability sufficient to undermine confidence in the outcome." *Id.* at
2 693-94. The court need not address both the performance prong and the
3 prejudice prong if the petitioner fails to make a sufficient showing of
4 either. *Id.* at 700.

5 Here, Petitioner cannot demonstrate that his counsel's performance
6 fell below an objective standard of reasonableness. This is because the
7 failure to raise a meritless legal argument does not constitute
8 ineffective assistance of counsel. *Shah*, 878 F.2d at 1162. And in light
9 of the Supreme Court's decision in *Caron*, it would have been fruitless
10 for Petitioner's counsel to argue Petitioner's civil rights were fully
11 restored after four Oklahoma felony burglary convictions. Accordingly,
12 Petitioner's counsel's failure to challenge his Oklahoma convictions did
13 not constitute ineffective assistance of counsel.

14 **III. Conclusion**

15 Accordingly, **IT IS HEREBY ORDERED:**

16 1. Petitioner's Motion to Vacate, Set Aside or Correct Sentence
17 **(Ct. Rec. 100)** is **DENIED**;

18 2. Petitioner's Motion for Discovery and Subpoena Powers
19 **(Ct. Rec. 103)** is **DENIED** as moot;

20 3. Petitioner's Motion for Appointment of Counsel in Motion Under
21 28 U.S.C. § 2255 **(Ct. Rec. 104)** is **DENIED** as moot;

22 4. The criminal file and its civil companion case shall be closed.

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ORDER * 9

1 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
2 Order and distribute copies to Respondent's counsel and Petitioner.

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4 **DATED** this 16th day of October, 2007.

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6 S/ Edward F. Shea
7 EDWARD F. SHEA
United States District Judge

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